IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

FRIDAY, THE 19TH OCTOBER 2007 / 27TH ASWINA 1929

OP.No.11868 of 2001(K)

PETITIONER:

M/S. ZEENATH GARMENTS,
KOTTAKKAL, REPRESENTED BY M.ABOOBACKER HAJI,
MANAGING PARTNER.

BY ADV.DR.K.B.MUHAMED KUTTY

RESPONDENTS:

1. THE INTELLIGENCE OFFICER,
SQUAD NO.II,
DEPT. OF COMMERCIAL TAXES,
MALAPPURAM.

2. THE SALES TAX OFFICER,
COMMERCIAL TAXES, MANJERI.

3. THE COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI V.TEK CHAND

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 19/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.No.11868/01

ORDER ON CMP.NO.18968/2001 IN OP.NO.11868/2001

DISMISSED

19/10/2007 Sd/- P.R.RAMAN, JUDGE.

APPENDIX

PETITIONER'S EXTS:

EXT.P1 TRUE COPY OF THE S.I.R. PREPARED BY THE IST RESPONDENT DTD. NIL.

EXT.P2 TRUE COPY OF THE LETTER DTD. 14/1/1997 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT.

EXT.P3 TRUE COPY OF THE LETTER DTD. 10/10/1998 -DO- -DO-

EXT.P4 TRUE COPY OF THE LETTER (NOTICE) DATED 13/9/1999 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.

EXT.P5 TRUE COPY OF THE NOTICE DATED 27/9/1999 ISSUED BY THEir 2ND RESPONDENT TO THE PETITIONER.

EXT.P6 TRUE COPY OF THE RECEIPT DTD. 3/5/1999 ISSUED BY KOTTAKKAL GRAMA PANCHAYAT.

EXT.P7 TRUE COPY OF THE CERTIFICATE DATED 25/2/2000 ISSUED BY KOTTAKKAL GRAMA PANCHAYAT.

EXT.P8 TRUE COPY OF THE OBJECTION DATED 10/11/1999 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT.

EXT.P9 TRUE COPY OF THE ORDER NO.TRL.35/99-2000 DATED 31/1/2000 OF THE IST RESPONDENT.

EXT.P10 TRUE COPY OF THE REVISION ORDER NO.RP 5/2000 DATED 21/7/2000 PASSED BY THE DY. COMMISSIONER, COMMERCIAL TAXES, MALAPPURAM.

EXT.P11 TRUE COPY OF THE ORDER NO.R2-46195/2000/CT DATED27/2/2001 OF THE 3RD RESPONDENT.

EXT.P12 TRUE COPY OF THE OBJECTION DATED 30/11/2000, SUBMITTED BY THE PETITIONER TO THE 3RD RESPONDENT.

EXT.P13 TRUE COPY OF THE REVISION PETITION DTD. 24/3/2000 SUBMITTED BY THE PETITIONER TO THE 3RD RESPONDENT.

EXT.P14 TRUE COPY OF THE POSTAL ACKNOWLEDGEMENT.

EXT.P15 TRUE COPY OF THE LETTER DATED 22/12/99 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT.

EXT.P16 TRUE COPY OF THE LETTER DATED 7/10/1999 SUBMITTED BY THE PETITIONER TO THE 2ND RESPONDENT.

EXT.P17 TRUE COPY OF THE JUDGMENT DATED 18/8/1982 IN O.P.NO.1323/82-E OF THIS COURT.

EXT.P18 TRUE COPY OF THE LETTER DTD. 18/3/2000 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT WITH DEMAND DRAFT.

EXT.P19 TRUE COPY OF THE RENT AGREEMENT IN RESPECT OF GODOWN NO.KPI/850A DATED 28/9/1999.

EXT.P20 TRUE COPY OF THE LETTER DATED 8/10/1999.

EXT.P21 TRUE COPY OF RENT AGREEMENT IN RESPECT OF ROOM NO.KPI/538/CD DATED 1/1/1997.

EXT.P22 TRUE COPY OF RENT AGREEMENT IN RESPECT OF ROOM NO.850B DATED 10/10/1998.

EXT.P23 TRUE COPY OF THE AFFIDAVIT BY THE OWNER OF THE ROOM DATED 12/7/2000.

EXT.P24 TRUE COPY OF THE AFFIDAVIT BY THE OWNER OF THE ROOM DATED 13/87/2000.

P.R.RAMAN, J.

O.P.No.11868 OF 2001

Dated this the 19th day of October, 2007

JUDGMENT

Petitioner, M/s.Zeenath Garments, who is an assessee under the K.G.S.T. Act, is a dealer in readymade garments. The business premises was searched by the Intelligence Wing of the Sales Tax Department on 12/8/1999 in exercise of its power under Section 28(3) of the K.G.S.T. Act. Based on the search and inspection so conducted a shop inspection report was prepared as evidenced by Ext.P1 under date 12/8/1999. Though the shop inspection report was not signed by the representatives of the dealer, according to the department, the same was served by affixture. During the course of such inspection, day book, sale bills and stock were verified and found that there is huge difference in the stock. As a result, it was found that there is an omission to account the entire sales. Thus, according to the department, unearthed suppressions, the value of such suppressed material comes to Rs.77,40,050/- the tax effect of which is Rs. 4,64,403/-. Thereafter, petitioner was served with notice and he submitted a reply and after considering the reply Ext.P8, order Ext.P9 was passed imposing

penalty of Rs. 9,29,490/- on the petitioner under Section 45 A of the K.G.S.T. Act on the ground that the petitioner has not maintained proper accounts. The assessee preferred a revision before the Deputy Commissioner. The Deputy Commissioner set aside the order of penalty. Thereafter, the Commissioner in exercise of his suo motu power revised the order of the Deputy Commissioner and restored the order of the Intelligence Officer, Malappuram dated 31/1/2000. The petitioner in such circumstances, has preferred this original petition seeking to quash Exts.P9 and P11 orders.

2. The main contention advanced on behalf of the petitioner is that the petitioner has informed the Sales Tax Officer that Building No. TP 1/538 C and D belonging to Parayil Mohammed Kutty Haji, situated in Ward No.1 of Kottakkal Panchayat is being used as godown of the petitioner with effect from 1/1/1997. Similarly, by Ext.P3 he informed the Sales Tax Officer about another godown situated in Door No.KP I/850B. Both Exts.P2 and P3 are admittedly received by the Sales Tax Officer as evidenced by Exts.P4 and P5. Further according to the petitioner, the sales tax assessment records will also clearly show that the petitioner has duly informed the Sales Tax Officer concerned about the existence of two godowns, where the petitioner used to stock the goods; but at the time of inspection of the shop, the Intelligence Wing did not inspect these godowns and therefore, the observations against column No.3 as though

the petitioner is not maintaining any other godown is contrary to facts. This aspect of the matter was considered by the Deputy Commissioner in the revision filed by the petitioner/assessee, who on verification of the assessment records found the existence of these godowns. According to the petitioner, in Ext.P10 order passed by the Deputy Commissioner the discrepancies found out were only because of the reason of non-consideration of the stock held by the petitioner in the godowns duly declared to the Assessing Authority in time during the year 1997-98. The Deputy Commissioner for that reason alone held that the order of penalty passed by the Intelligence Officer is illegal and irregular. The Commissioner while exercising his suo motu power except to consider the contention regarding the existence of two other godowns, did not consider the various other contentions which the petitioner had urged before the Deputy Commissioner, which however was not considered by the Deputy Commissioner only for the reason that he allowed the revision on a sole ground that the discrepancies noticed by the authorities were because of the non-verification of the stock in the godowns and hence according to him, the Commissioner of Commercial Taxes either should have remanded the case to the Deputy Commissioner for consideration of other grounds urged in the revision or should have considered himself those grounds and in so far as this contentions are not considered, the order is vitiated for that reason. He also submitted that the value

estimated has no nexus with the real value of the goods even the estimation should be based on some data and the penalty that is calculated thus is excessive and arbitrary.

3. It is also submitted by the learned Senior Counsel Dr.K.B.Muhammed Kutty appearing on behalf of the petitioner that at any rate, there are no valid grounds to impose the maximum penalty. Per contra the learned Government Pleader appearing on behalf of the State would submit that the assessee did not point out to the Officers concerned at the time of shop inspection that there was any other godown maintained by him. Further the registration certificate issued to the assessee did not contain any specific endorsement regarding the godowns as contemplated under Rule 5(25) of the Sales Tax Rules. He also referred to Rule 33 of the Kerala General Sales Tax Rules and contended that petitioner is bound to display a board showing the details which mandates that every dealer possessing godown or godowns shall put up in front of such godown or godowns, name board showing the Municipal/Corporation/Panchayat-number of the building, the name of the dealer etc. According to him, no such board was put up as required by Rule 33. According to him, if the assessee had a case that the estimated value is at a higher side, nothing prevented the assessee from producing materials to show that the actual value is much less than the estimated value. But no such plea was raised before any of the authorities nor any

materials produced in support thereof. As such it cannot be said that the assessee has discharged his burden of showing that the estimated value is at a higher side. At any rate, in the available materials, it cannot be said that the estimated value of the various items is disproportionate to the goods in question. According to him, the assessee had been imposed penalty under Section 45 A of the K.G.S.T. Act on the previous occasion as well and having regard to the fact that the suppression was detected and the volume of such suppression detected is so huge, the maximum penalty is leviable and both the Intelligence Officer as well as the Commissioner have given valid reasons for imposing such maximum penalty and hence, according to him, no interference is called for.

4. It is true that the assessee had informed the Sales Tax Authorities about the fact that he is maintaining two other godowns as revealed by Exts.P2 and P3. The Deputy Commissioner had verified the sales tax assessment files and it is after verification of the files that he came to the conclusion that the authorities are aware of the existence of other godowns. This being a question of fact as revealed by the records, this cannot be slightly brushed aside by the Commissioner while exercising the suo motu power. It is true that the assessee might not have got incorporated in his registration certificate about these godowns. But for that reason alone it cannot be said that actually if he has two godowns, the authorities need not inspect such godowns to see whether there is any

stock maintained by him. If the details regarding the godowns are not noted in the Registration Certificate, that may be a matter for which they could have taken other independent action which however was not happened in this case. Therefore, as a matter of fact, godowns were maintained and where there is stock, necessarily, the authorities ought to have inspected the godowns also but in the present case, even if they had inspected that godowns and even accepting the contentions of the assessee, what could be found in the godown is only regarding the stock alleged to have been kept there namely "junior shirts" and "junior pants". In paragraph 12 of Ext.P8 reply the assessee has offered an explanation with regard to "junior pants" and "junior shirts" that the stock variation happened because of misclassification. Two items are actually taxable, but classified as non-taxable by mistake. He has given the opening stock and the purchase of "junior pants" and "junior shirts" and the stock found in shop and stock in godown. All these items are separately given and no other items are given. If that be so, it can only be contended that the value of suppressed items to the extent of the stock found in the godown is to be reduced. It could be seen from the proceedings of the Intelligence Officer (Ext.P9) that in the turnover suppressed the quantity of 2,992 junior shirts valued at Rs.2,99,200 and the quantity of 1,465 junior pants valued at Rs.2,93,000/- are included total of which comes to about Rs.77 lakhs. Though the assessee would contend that the estimated value is at a

higher side on the various items, no such plea as such is raised either in his objection or in the revision filed before the authorities concerned and as such this plea cannot be raised for the first time in this writ petition.

5. According to the petitioner, the maximum penalty that is imposed is not justified. It is true that the authority while imposing the maximum penalty has to apply its mind to the factual situation and then decide as to whether this is a fit case where maximum penalty is to be imposed. The Intelligence Officer has considered this aspect of the matter and according to him, because of the huge volume of suppression detected, this is a fit case where maximum penalty should be imposed. It is also found that on previous two occasions the assessee was imposed penalty under Section 45 of the K.G.S.T. Act. The Commissioner in his order, Ext.P11 has also agreed with the said finding and justified the imposition of maximum penalty. Therefore, it cannot be said that the imposition of maximum penalty in this case is irrational and arbitrary.

6. Since the assessee has made out a case that he had informed the Sales Tax Assessing Officer about the existence of two godowns and according to him, certain quantity of "junior shirts" and "junior pants" were kept in those godowns. The Intelligence Officer rejected his contention for the only reason that these godowns were given temporary number by the Panchayat. It is the question of existence of the godown that has to be considered merely because the number originally served

was temporary does not show the non-existence of the building and user of it as a godown. On the other hand, it only shows that there is such a building. Further the evidence produced by the assessee in this case, namely, Exts.P6 and P7, would show that he had been paying building tax in respect of the building which was maintained as godowns. The Deputy Commissioner has also entered a finding that there was such a godown as informed by the assessee concerned.

7. In such circumstances, it has to be found that the estimated value of the "junior pants" and "junior shirts" is required to be deleted out of the total suppression detected and the tax effect thereon. Instead of remitting the matter for that purpose, it is thought proper that the relief be moulded by this Court itself and to give a quietus to the issue. Accordingly, the penalty is reduced to Rs.7,29,490/- (Seven lakhs twenty nine thousand and four hundred and ninety) as against Rs.9,29,490/-, thus giving a reduction of Rs. 2 lakhs. Except to the above modification the petitioner is not entitled for any other relief.

Original Petition is disposed of as above.

P.R.RAMAN,
Judge.

kcv.

P.R.RAMAN, J.

O.P.NO.11868 OF 2001

JUDGMENT

19th October, 2007